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Conference

1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

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3 UNITED STATES OF AMERICA,

4 v.

20 CR 314 (GHW)

5 ETHAN PHELAN MELZER,

6 Defendant.

7 -----x

8 New York, N.Y.  
9 February 22, 2021  
9:00 a.m.

10 Before:

11 HON. GREGORY H. WOODS,

12 District Judge

13  
14 APPEARANCES

15 AUDREY STRAUSS

Acting United States Attorney for the  
Southern District of New York

16 SAMUEL S. ADELSBERG

17 SIDHARDHA KAMARAJU

MATTHEW HELLMAN

18 Assistant United States Attorney

19 JENNIFER E. WILLIS

20 JONATHAN A. MARVINNY

Attorney for Defendant Melzer

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1 (Case Called)

2 THE COURT: Let me begin by taking appearances from  
3 the parties.

4 First, who is on the line for the United States?

5 MR. ADELSBERG: Good morning, your Honor.

6 This is Sam Adelsberg, for the United States, and I am  
7 joined by Sid Kamaraju and Matthew Hellman.

8 THE COURT: Thank you very much.

9 Who is on the line for the defendant?

10 MS. WILLIS: Good morning, your Honor.

11 Jennifer Willis, Federal Defenders of New York, on  
12 behalf of Mr. Melzer, joined by Jonathan Marvinny, also of the  
13 Federal Defenders of New York.

14 THE COURT: Thank you very much.

15 Mr. Melzer, are you on the line?

16 THE DEFENDANT: Yes, judge.

17 THE COURT: Thank you very much. Let me begin by just  
18 providing you with a few brief instructions about the rules  
19 that I'd like the parties to follow during this conference. At  
20 the outset I just want to remind all of you that although we're  
21 conducting this proceeding remotely, it is a public proceeding.  
22 Any member of the public or press is welcomed to audit this  
23 proceeding. Dial-in information is available through the  
24 Court's website. Just be mindful of that.

25 The second thing that I want to ask each of you to do

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1 is to please keep your phones on mute to the extent that you  
2 can throughout the course of this proceeding. If you don't  
3 have the capacity to put your phone on mute, Mr. Melzer, it's  
4 fine but for anyone who does have that capacity, please, place  
5 your phones on mute and keep it on mute at all times except  
6 when you are addressing the Court or your adversary.

7 Third, I'd like to ask each of the participants in  
8 this conference to, please, state your name each time that you  
9 speak during this conference. Please, do that even if you've  
10 spoken previously. It will help our court reporter identify  
11 who is speaking and as a result will help us keep a clearer  
12 record as of today's conference.

13 Fourth, I am inviting our court reporter to let us  
14 know if she would like to us do anything that will make it  
15 easier for her to hear and understand us. If she asks you to  
16 do something that will make it easier for her to do her job,  
17 please, do it to the extent that you can.

18 And finally, I am ordering that there be no recording  
19 or rebroadcasting of any of today's conference.

20 So, with that out of the way, I'd like to spend a few  
21 brief moments talking about the reasons why we're conducting  
22 these proceedings by remote means ensuring that the defendant  
23 is willing to consent to conduct that proceeding by remote  
24 means.

25 We are, as you all know, in the midst of the COVID-19

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1 pandemic. I'm conducting this proceeding pursuant to the  
2 authority provided by Section 15002 of the CARES Act and the  
3 standing orders issued by our chief judge pursuant to that act.  
4 Counsel are appearing before me by telephone. The defendant is  
5 present on the conference and is also participating by  
6 telephone. I've already confirmed that all of you can hear me  
7 as we've taken appearances but, please, let me know immediately  
8 if any of you have any difficulty hearing me or an attorney or  
9 the defendant while they're speaking to me.

10 So, we've scheduled this matter as a status  
11 conference. I've received, I should say that I've requested  
12 that we conduct this proceeding by video conference.  
13 Unfortunately, there is limited capacity for video  
14 conferencing. So, we are not able to get a spot to conduct  
15 this proceeding by video conference. As a result we're  
16 conducting it by telephone. Because I requested video  
17 conferencing for this conference and was not provided it, I  
18 find that the conferencing was not reasonably available for us  
19 to conduct this proceeding because the defendant is able to  
20 hear and understand what's happening hear and the defendant is  
21 able to participate in the proceeding by telephone.

22 Now, I've received a written waiver of right to be  
23 present at the criminal proceeding which indicates that the  
24 defendant is willing to proceed with this conference. By  
25 remote means, indeed, without his presence. The document that

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1 I have has been signed by Mr. Marvinny. The signature date on  
2 the digital signature is February 19, 2021. It's also been  
3 digitally signed on behalf of Mr. Melzer.

4 What I'd like to do is turn to defense counsel to  
5 confirm that the defendant was advised of his right to appear  
6 at this proceeding, that he understood that right and that he  
7 voluntarily gave up that right.

8 Counsel for defendant, turning to the waiver that I  
9 just described, can you please describe how the document was  
10 provided for the defendant and the circumstances in which you  
11 discussed it with him.

12 MS. WILLIS: Yes, your Honor. This is Jennifer Willis  
13 from the Federal Defenders.

14 Jonathan Marvinny, from my office, had a legal  
15 confidential phone call with Mr. Melzer on February 11. At  
16 that time Mr. Melzer did not have a physical copy of the form  
17 but Mr. Marvinny did review the form and read it to him,  
18 discussed with him his rights with respect to the CARES Act and  
19 Mr. Melzer at that time expressed that he understood and that  
20 he was willing to have today's conference be handled remotely.

21 Because Mr. Melzer never did not have a physical copy  
22 of the form, and even if he had, there's been delays in sending  
23 and receiving documentation and paperwork from the jail, so  
24 Mr. Melzer never did authorize Mr. Marvinny to sign that  
25 document on his behalf, which Mr. Marvinny did and obviously

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1 that's the document that was provided to the Court.

2 THE COURT: Good. Thank you very much.

3 Just briefly for you, Mr. Melzer, did you hear what  
4 your attorney just said to me?

5 THE DEFENDANT: Yes, judge.

6 THE COURT: Did you authorize your attorney to sign  
7 the document waiving your right to be present physically in  
8 court for this proceeding?

9 THE DEFENDANT: Yes, judge.

10 THE COURT: Good. Thank you very much.

11 So, on the basis of the proffers by counsel and  
12 written waiver executed by counsel on the defendant's behalf, I  
13 find that the defendant has knowingly consented to conduct this  
14 proceeding by telephone.

15 So, with that, thanks to counsel and Mr. Melzer. What  
16 I would like to do is turn to the discussion of the substantive  
17 issues raised by this conference. I scheduled this as a status  
18 conference with respect to this matter.

19 Let me turn first to counsel for the United States.  
20 What would you like to tell me about the status of the case and  
21 what is your proposal regarding next steps?

22 Counsel for the United States.

23 MR. ADELSBERG: Thank you, your Honor. This is Sam  
24 Adelsberg.

25 Your Honor, as for discovery, Rule 16 discovery has

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1 been produced. As detailed in the prior conference in matter,  
2 discovery was fairly voluminous here. We've also produced  
3 several documents of classified discovery to defense counsel  
4 and I understand that we may be ready to set a motion schedule  
5 today.

6 THE COURT: Good. Thank you very much.

7 Counsel for defendant, let me turn to you. The same  
8 question. What would you like to tell me about the status of  
9 the case and what are your proposals regarding next steps in  
10 the case?

11 MS. WILLIS: Your Honor, as the government indicated,  
12 we are in receipt of discovery. It is quite voluminous and  
13 also includes, not just documentation, but video and recordings  
14 and things that sort of can't be reviewed in a truncated  
15 manner. Counsel has been in the process of going through all  
16 of the discovery. I think there's been more of a delay with  
17 respect to Mr. Melzer's ability to review discovery, just given  
18 some of the current limitations and restricts for people who  
19 are in custody and how much time he had to have access to a  
20 sort of secured and private computer. Nevertheless, he has  
21 been going through the process as well and as I said, counsel  
22 is also reviewing discovery.

23 I would agree with the government's assessment that we  
24 can set a motion schedule. I do have a, sort of where we are  
25 in terms of defense with respect to motion is that there are

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1 some motions that are purely legal in nature and we would be  
2 able to file those. We believe we'd be requesting about 60 to  
3 90 days to file those. However, there are also some additional  
4 motions which we might want to file in the future, but in order  
5 to know whether we have a valid motion in some of these other  
6 areas, we need to have some evaluations conducted. And again,  
7 because of the restrictions imposed because of the COVID-19  
8 pandemic, the experts that we have spoken to have not been able  
9 to do the things that they would need to do to accomplish those  
10 evaluations yet.

11 So, while we do want to obviously move forward with  
12 the case and again, to be prepared within 60 to 90 days to file  
13 some motions, I did just want to alert the Court to the fact  
14 that there are some motions that possibly we might want to be  
15 able to file but we can't make that determination until these  
16 evaluations have been conducted and there has been a delay in  
17 that process he is beyond the control of our experts. So, I do  
18 just want to apprise the Court of that as well.

19 THE COURT: Good. Thank you.

20 Let me just ask counsel for defendant about the latter  
21 category of motions.

22 Do you think that you will have sufficient information  
23 regarding whether there's a motion or motions that is or are  
24 motion or motions to be made within the next couple of months?  
25 I ask because I understand that you're going to propose a



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1 motion briefing schedule which motions would be due  
2 approximately 60 to 90 days from now. So, I'm curious if you  
3 are going to have more data about the full suite of motions  
4 that might be brought within the next couple of months because  
5 that may impact how we schedule motion practice here.

6 Counsel.

7 MS. WILLIS: Your Honor, I would hope so. Again, some  
8 of it is truly sort of beyond our control. I don't know at  
9 what point jail will start more broadly allowing people in. I  
10 don't know at what point our experts would deal with safe and  
11 be prepared to go to places that they need to go to to do the  
12 evaluations that are required. I think our belief is that  
13 certainly within the 60 to 90 days that we're proposing for the  
14 filing of what I will call our initial motions, we would hope  
15 to have some more concrete information about whether we would  
16 have additional motions and when we would be prepared to file  
17 them.

18 I think what we were proposing, and I know this is,  
19 obviously, somewhat unusual, would be that we could file a  
20 initial set of motions and then apprise the court of whether or  
21 not conclusively we thought that there were additional motions  
22 and then file those at a later time.

23 THE COURT: Thank you, counsel.

24 Let me ask, with respect to what you term the initial  
25 round of motions, do you anticipate that any of them are of a

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1 sort that would require an evidence hearing to resolve it?

2 MS. WILLIS: No, your Honor, I don't think so, no.

3 THE COURT: Good. Thank you very much.

4 So, I understand that counsel for the defense is  
5 asking a period of approximately 60 to 90 days to file what  
6 they've described as an initial round of motions. The two  
7 stage approach here is a little unusual. So, let me hear from  
8 the government both with respect to the staged approach and  
9 also the proposal that motions be filed in the 60 to 90 time  
10 table.

11 Counsel for the United States, what is your view?

12 MR. ADELSBERG: Thank you, your Honor.

13 Sam Adelsberg again speaking for the government. Your  
14 Honor, the government does not oppose the stage approach and we  
15 recognize that the ability of the access that -- as for the  
16 filing of an initial round of legal motions, we think that  
17 makes sense. Your Honor, the government has no objection to 90  
18 days for the defendant to file those initial round of motions.

19 THE COURT: Good. Thank you very much.

20 So, counsel for defendant, I'm happy to raise the  
21 proposal that you made. You say 60 to 90 days. I am not going  
22 to press you to the earlier of those two days. Are you looking  
23 for me to establish a deadline approximately 90 days from now?

24 MS. WILLIS: Yes, your Honor.

25 Thank you.

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1 THE COURT: Good. Thank you very much.

2 So, counsel for the United States, can I ask how much  
3 time would you propose that I provide you to file any  
4 opposition to that set of motions?

5 MR. ADELSBERG: Sam Adelsberg again.

6 Your Honor, the government would ask for 30 days to  
7 respond. We obviously don't know the complexity of motions  
8 that will be coming our way but given some to initial  
9 conversations of defense we feel that 30 days would be  
10 sufficient to allow us to adequately address the motions that  
11 are raised.

12 THE COURT: Thank you very much.

13 So, I would propose to set the following schedule, the  
14 series of legal motions and I expect that all the motions that  
15 should be made prior to trial other than those which are  
16 contingent upon the evaluations described by counsel, will be  
17 brought in this round of motions. That set of motions will be  
18 due no later than May 24, 2021. Any opposition to those  
19 motions will be due no later than 30 days following the date of  
20 service of the motion, and any reply will be due no later than  
21 14 days following the date of service of the opposition.

22 Counsel, so I've established this briefing schedule.  
23 What I'd like to ask is how counsel for defendant initially  
24 propose that we check-in regarding the prospect of additional  
25 motion practice here. It sounds as though you have a sense of

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1 what that looks like within the next 60 to 90 days perhaps.

2 How would you propose that we reconvene, that you  
3 communicate with the Court about any such potential motion  
4 practice, counsel for defendant?

5 MS. WILLIS: Your Honor, Jennifer Willis.

6 I would propose that as an initial matter that we  
7 consult with the government and file a letter to update the  
8 Court. If we are ready and we have the information and we're  
9 prepared to concretely sort of add to the motion schedule,  
10 perhaps, that could either be done also by letter or if the  
11 Court preferred, we could then set a conference date. But I  
12 think the initial check makes sense to be done by letter  
13 because it may be that update will be we actually need several  
14 more weeks or something of that type. So, I think it would  
15 make sense to initially confer by letter.

16 THE COURT: That's fine. So, counsel, I'll direct  
17 that by the same date, that is May 24 that defense provide the  
18 Court with a status update regarding what is described in the  
19 second set of potential motions. Your letter should describe  
20 the position of the United States with respect to those  
21 potential motions. If you know that there a motion, please,  
22 propose a schedule for briefing it. If you believe that you  
23 need additional time to evaluate whether or not additional  
24 motion practice is warranted, please, let me know that in the  
25 letter and let me know the amount of time that it will take you

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1 to make a concrete determination.

2 Good. So, counsel, I am happy to issue an order that  
3 will a establish the briefing schedule that I've described. It  
4 may be make sense for us to schedule another hearing sometime  
5 after the filing of these motions and after they're fully  
6 briefed. So, I am going to propose that we gather again in  
7 late July if that's acceptable to you, just as an opportunity  
8 to touch base and, perhaps, as an opportunity for oral argument  
9 with respect to motions to the extent that I believe that that  
10 would be helpful for me to resolve them.

11 I am looking at my calendar and I would propose that  
12 we schedule a follow-up hearing here sometime around July 26 or  
13 27.

14 Counsel, what's your view? Are you available to meet  
15 again for a conference on January 26, I'd say at ten a.m.

16 Counsel, first for the United States? I'm sorry.  
17 July 26.

18 MR. ADELSBERG: Your Honor, this is Sam Adelsberg.  
19 Yes, that works for the government.

20 THE COURT: Good. Thank you.

21 Counsel for the defendant.

22 MS. WILLIS: Your Honor, this is Jennifer Willis.  
23 That date and time works for defense as well.

24 THE COURT: Good. Thank you very much.

25 Counsel have any other business that we need to

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1 accomplish here apart from the Speedy Trial clock? I  
2 understand that there will be motions pending but, counsel,  
3 before we come to the Speedy Trial clock, anything else that  
4 either of you would like to raise with the Court?

5 First, counsel for the United States.

6 MR. ADELSBERG: Your Honor, we also anticipate filing  
7 a SEPA Section 4 motion in this case and as we've already let  
8 your Honor know -- as your Honor knows, the filing of that  
9 motion requires some coordination with a number of different  
10 government entities, entities that have been hampered by the  
11 pandemic and so, we ask that the filing deadline for our SEPA  
12 Section 4 motion be simultaneous with the deadline for our  
13 opposition to defense motions. So, based on my calculation, 30  
14 days after May 24, I believe that would be on June 23.

15 THE COURT: Thank you.

16 Counsel for defendant, what's your view regarding that  
17 request?

18 MS. WILLIS: Jennifer Willis, your Honor.

19 No objection.

20 THE COURT: Thank you very much, counsel.

21 That application is granted.

22 Anything else from the United States?

23 MR. ADELSBERG: Your Honor, as your Honor mentioned,  
24 we know there's an outstanding motion but out of an abundance  
25 of caution, the government would like to make an application to

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1 exclude time under the Speedy Trial Act from today until  
2 July 26, 2021. The government submits that the interests of  
3 justice outweigh the defendants's and the public's right to a  
4 speedy trial, to allow the defendant to review discovery, to  
5 decide which motions to file and to file motions.

6 THE COURT: Thank you very much.

7 There are motions pending or will be pending but,  
8 counsel for defendant, what's your position regarding the  
9 request to exclude time?

10 MS. WILLIS: Your Honor, I have no objection to the  
11 exclusion of time.

12 THE COURT: Thank you.

13 I will exclude time from today until July 26, 2021.  
14 After balancing the factors specified in 18 U.S.C. Section  
15 3161(h (7)). I find that the ends of justice served by  
16 excluding such time outweigh the best interests of the public  
17 and the defendant in a speedy trial because it will allow time  
18 for continued review of the discovery materials by defendant  
19 and his counsel, time for the defendant to prepare any motions,  
20 and time for the continued evaluation process to start by  
21 counsel for defendant.

22 Is there anything else that the defense would like to  
23 raise before we adjourn?

24 counsel for the defendant.

25 MS. WILLIS: Your honor, just briefly, two

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1 housekeeping matter. I don't believe that I saw on the docket  
2 a Brady order and I don't believe that the government has yet  
3 provided any record of attorney general authorization which is  
4 required under 18 U.S.C. 2332(b).

5 THE COURT: Thank you.

6 So, let me just take a brief moment, counsel. Let me  
7 first direct the prosecution to comply with its obligation  
8 under Brady v. Maryland and its progeny to disclose to the  
9 defendant following information whether admissible or not, that  
10 is, quote, favorable to, closed quote, the defendant, quote,  
11 material either to guilt or to punishment, closed quote, and  
12 known to the prosecution possible consequences for  
13 noncompliance may include dismissal of individual charges of  
14 the entire case, exclusion of evidence and professional  
15 discipline of court sanctions on the attorneys responsible.

16 I will enter a written order more fully describing  
17 this obligation and the possible consequences of failing to --  
18 later today. I will direct the prosecution to review and fully  
19 comply with that order.

20 Counsel, does the prosecution confirm that it  
21 understands its obligations and will hold them?

22 MR. ADELSBERG: Yes, your Honor.

23 THE COURT: Good. Thank you.

24 Counsel, would you, please, comment on the information  
25 that the defendant's counsel has just asserted that they have



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1 not yet seen.

2 MR. ADELSBERG: Your Honor, this issue was raised just  
3 this prior week by defense counsel. Our understanding, we  
4 checked with individuals in the main justice or the Department  
5 of Justice and our understanding is that particularly in the  
6 document generated but we are going to look into that and  
7 provide that document if we can provide that certification for  
8 defense.

9 THE COURT: Thank you. I expect that you will do so.  
10 Counsel for defendant, what else would you like to  
11 raise?

12 MS. WILLIS: Nothing else from the defense, your  
13 Honor.

14 Thank you.

15 THE COURT: Good. Thank you all for participating in  
16 this proceeding and it is adjourned.

17 (Adjourned)  
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